No. 13,519

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM LAFAYETTE ALFORD,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

Upon Appeal from the Supreme Court of the Territory of Hawaii

TERRITORY'S ANSWERING BRIEF

FILED

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TERRITORY'S ANSWERING BRIEF

STATEMENT OF FACTS

In order to present a more complete statement of the factual situation upon which the trial court found appellant guilty of procuring, the Territory of Hawaii offers an amplification of the appellant's statement of facts.

There is substantial evidence within the periods charged in the indictment that appellant did induce, compel and procure Mrs. Alford to practice prostitution. The appellant made arrangements for flights to the other islands for Mrs. Alford when she went to the other islands to practice prostitution. He would pick up the tickets and take her to and from the airport (Tr. pp. 59-60). The appellant further directed

Mrs. Alford in the manner in which her earnings from prostitution were to be mailed to appellant. He directed her to fold the money in half and place it in an envelope and send it special delivery (Tr. p. 57). The appellant started Mrs. Alford in the practice of prostitution and kept her as a prostitute by taking her as his wife (Tr. pp. 70, 72). He encouraged her in the act of prostitution even after their marriage (Tr. pp. 54-55). He demanded from Mrs. Alford all the money she earned as a prostitute (Tr. pp. 53, 54, 57, 60, 74, 75).

The appellant had another woman besides Mrs. Alford practicing as a prostitute from the same house in which Mrs. Alford lived (Tr. p. 70). Prior to the marriage of Mrs. Alford to appellant, he persuaded her into prostitution by promises and threats, by making arrangements for acts of prostitution, and in one instance by manhandling her.

SUMMARY OF ARGUMENT

I.

The Supreme Court of the Territory of Hawaii Did Not Err in Holding and Finding That There Was Sufficient Evidence to Sustain an Essential Element of the Charges Contained in the Indictment, Namely, That Appellant Did Induce, Compel and Procure A Certain Female Named Edna Rodrigues Alford to Practice Prostitution During the Various Times Set Forth in the Indictment.

This appeal involves the question of whether the Supreme Court of the Territory of Hawaii erred in holding and finding that there was sufficient evidence to sustain a conviction of the appellant, William Lafayette Alford.

A. THIS CASE DOES NOT INVOLVE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

There is no question that the constitutional guaranties of the Federal Bill of Rights are applicable to the Territory of Hawaii including the due process clause of the Fifth Amendment (Appellant's Brief, p. 7).

In *Buchalter v. New York*, 319 U. S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492 (1942), the Supreme Court of the United States defines "due process" and the law applicable herein at pages 1495-1496:

> "The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land.' Where this requirement has been disregarded in a criminal trial in a state court this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee. But the Amendment does not draw to itself the provisions of state constitutions or state laws. *It leaves the states free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate; and does not permit a party to bring to the test of a decision in this court every ruling made in the course of a trial in a state court.*" (Emphasis ours.)

In *Frank v. Mangum*, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969, the court states at pages 979-980:

> "As to the 'due process of law' that is required by the 14th Amendment, it is perfectly well settled

that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense. (citing authorities)"

Again the court states in reference to "due process," at page 983:

". . . This familiar phrase does not mean that the operations of the state government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the state courts, or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases."

In like manner, the Fifth Amendment holds the same in respect to the administration of the criminal laws of the Territory of Hawaii. See *Palakiko v. Territory of Hawaii*, 188 F. 2d 54, 60; *Young v. Territory of Hawaii*, 160 F. 2d 289, 290; *Fukunaga v. Territory of Hawaii*, 33 F. 2d 396, 397.

The test of due process is that a standard of fundamental fairness is required and whether that standard is complied with. *(Palakiko v. Territory of Hawaii, supra*, p. 60.)

This honorable court in *Palakiko v. Territory of Hawaii, supra,* at page 60, said:

> "We must note that our jurisdiction to review the action of the Hawaiian courts in holding the confessions admissible is a narrow one . . . We are not empowered to say what those local rules of evidence in Hawaii should be . . . (citing authorities)."

In Pioneer Mill Co. v. Victoria Ward, 158 F. 2d 122, 125 (1946), this honorable court said:

> ". . . Our power to reverse rulings of the territorial court on law or fact is limited to cases of manifest error, Waialua Agr. Co. v. Christian, 305 U. S. 91, 109, 59 S. Ct. 21, 83 L. Ed. 60."

In the case at bar, the Supreme Court of the Territory of Hawaii did not err in such a way as to give this honorable court jurisdiction as the Supreme Court of Hawaii found from the record ample evidence to sustain the verdict of the trial court that the appellant did induce, compel or procure Edna Rodrigues Alford to become a prostitute or hold herself out as a prostitute.

B. THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN AN ESSENTIAL ELEMENT OF THE CHARGE, NAMELY, THAT APPELLANT DID INDUCE, COMPEL OR PROCURE EDNA RODRIGUES ALFORD TO PRACTICE PROSTITUTION AND HOLD HERSELF OUT AS A PROSTITUTE.

The appellant specifies as error that the verdict is contrary to law in that there is no evidence that the appellant did induce, compel or procure Edna Rodrigues Alford to practice prostitution or to hold herself out as a prostitute.

Appellant cites *Cole v. Arkansas,* 333 U. S. 196, 68 S. Ct. 514, 92 L. Ed. 644, 645 (1948), as authority for the jurisdiction of this court to reverse the ruling of the Supreme Court of the Territory of Hawaii. In this case the information charged, and the evidence showed, a violation of Section 1 of the Penal Laws of the state, but at the trial the language and the construction placed upon it showed that it was intended to charge an offense under Section 2 of such law. Furthermore, the instructions by the trial judge to the jury were based on Section 2 of the Penal Law.

Appellee respectfully submits that the *Cole v. Arkansas* case is of little value as authority because the factual situation in the case cited is not parallel to the case at bar.

In the case at bar, there is considerable evidence from which the lower court could find the verdicts as it did. It is sufficient to state that the lower court believed the testimony of Edna Rodrigues Alford and the other witnesses for the government rather than that of the appellant when it brought verdicts of guilty against the appellant in all five counts of the indictment (Tr. pp. 114, 115, 116).

An examination of the trial transcript would indicate an abundance of evidence to be considered by the trial court. Testimony adduced during the trial of the case was of the following nature:

(As to "induced") That the appellant would give her nice clothes, a home, car, jewelry, things of that nature (Tr. pp. 53, 54).

(As to "compelled") The complaining witness testified as to threats directed at her by the appellant (Tr. pp. 51, 73); that the appellant manhandled her in one instance (Tr. p. 54).

(As to "procured") That the appellant purchased the tickets for her flights to the other islands where she went for the purpose of prostitution (Tr. pp. 59-60); that he drove her to and from the airport from where she left for the other islands to practice prostitution (Tr. pp. 60-61). Complaining witness further testified that after her marriage to the appellant, he encouraged her to continue practicing prostitution (Tr. pp. 54-55); that appellant directed her as to the mode in which she should send the money earned by her in prostitution to him (Tr. p. 57); and that appellant married her for the purpose of keeping her as a prostitute (Tr. pp. 70, 72).

It is the general rule that the appellate court will not reverse a verdict on error where the record shows that it was based on the credibility of witnesses or the weight of evidence. See *Hang Fook v. Rep. of Haw.*, 9 Haw. 593; *Territory v. Burum,* 34 Haw. 75, 76; *Territory v. Pai-a,* 34 Haw. 722, 728; *In re Oxiles,* 29 Haw. 323, 328; 3 *Am. Jur., Appeal & Error,* Secs. 887, 888, 889, pp. 441-451.

The statute of the Territory of Hawaii relating to writs of error expressly declares *that there shall not be a reversal for any finding depending on credibility of witnesses or the weight of evidence.* (Section 9564, *Revised Laws of Hawaii* 1945).

The trial judge is in a better position to weigh and ascertain what testimony to believe and what should be discarded as unworthy of belief.

In concluding this contention, appellee urges that there is clearly no merit to the appellant's contention that there was no evidence to sustain the allegation of the indictment.

II.

The Supreme Court of the Territory of Hawaii Did Not Err in Upholding the Conviction of the Appellant on the Ground That There Was Evidence to Sustain the Charges Contained in the Indictment. The Trial Court Did Find That the Defendant Did Induce, Compel and Procure Edna Rodrigues Alford to Practice Prostitution and to Hold Herself Out as a Prostitute and Not for an Offense for Which She Was Not Charged, Namely, That He Knowingly Received Money Without Consideration From a Woman Engaged in Prostitution.

A. THE QUESTION OF VARIANCE FROM THE CHARGE CANNOT BE RAISED FOR THE FIRST TIME IN THIS COURT.

No question of variance from the charge was raised or called to the attention of the trial court and ruled upon, nor has any failure to rule been preserved by proper exceptions in the trial court or the Supreme Court of the Territory of Hawaii. The question of variance not having been decided and ruled upon by the Supreme Court of the Territory of Hawaii cannot be raised for the first time in this court.

B. APPELLANT WAS NOT DENIED DUE PROCESS OF LAW IN THAT EVIDENCE WAS RECEIVED AND HE WAS CONVICTED AS CHARGED.

Assuming that the question of variance may be raised in this court for the first time, it is the appellee's contention that there was no variance of the evidence from the charge.

In the case at bar, although the prosecuting attorney may have been in error at the inception of the case as noted by his opening statement (Tr. p. 39), the trial court was not misled by the statement made by the prosecuting attorney and it did try and find the appellant guilty as charged. Before proceeding with the trial, the court stated in part as follows:

> ". . . My idea is that the offense consists of inducing, compelling or procuring a person to act as a prostitute, to practice prostitution, and thereby to obtain and secure from her a portion of the gains earned by her during the times alleged in the indictment. I do not feel that under this statute the defendant has to beat up a person in order to make her practice prostitution, or to exercise or to compel by force, or use of drugs, or some such thing. I may be wrong, but it is my understanding of the statute that it is the inducing, compelling or procuring, or any of them, whereby the procurer or the pimp obtains a portion of the ill-gotten proceeds." (Tr. p. 43)

In finding the appellant guilty of the charges against him, the court made the following statement:

> "I think the evidence clearly shows, and beyond any doubt in my mind, that this defendant did induce, compel and procure Edna Rodrigues Alford to hold herself out as a prostitute, and to practice prostitution, with the idea in his mind, Alford's mind, that he was going to get a portion of the ill-gotten gains earned by her.
>
> I further find that the testimony of the principal witness for the Government sustained the allegations in all five counts contained in the Indictment, and

I find the defendant is guilty as charged as to each count." (Tr. p. 116)

As it has been pointed out in Summary of Argument No. I of the Territory's Answering Brief, there is substantial evidence to uphold the conviction of the appellant as he was charged. An examination of the transcript of the proceedings in the trial court shows that the evidence received did not merely prove that the appellant knowingly received money without consideration from a woman engaged in prostitution, but goes further and sustains a conviction of the appellant as he was charged. Assuming that there was some variance, it was not such as to affect the substantial rights of the appellant. It did not deprive the appellant of his rights to be protected against another prosecution for the same offense nor did it mislead him.

We respectfully submit that the cases cited by the appellant are of little value as authority because the factual situations were different from the case at bar. In the instant case the trial court found that the evidence presented was sufficient to convict the appellant as he was charged and not for any other offense.

III.

The Supreme Court of the Territory of Hawaii Did Not Err in Upholding the Conviction of the Appellant Based on the Testimony of the Appellant's Wife as to Events Occurring Before and During Marriage.

A. EDNA RODRIGUES ALFORD WAS A COMPETENT WITNESS AGAINST HER HUSBAND IN THE CASE AT BAR AND THE ADMISSION OF HER TESTIMONY WAS PROPER.

The appellant contends that the rule at common-law is that a wife is not competent to testify against

her husband unless the crime charged is an offense against the person of the wife, and, that the Hawaiian statute is a codification of the common-law, and, therefore, should be strictly construed in accordance with common-law principles. The appellant further contends that the offense alleged to have been committed in these proceedings is not an offense against the person of the spouse testifying, and, therefore, Edna Rodrigues Alford is not a competent witness against her husband under Section 9838, *Revised Laws of Hawaii* 1945.

Section 9838, *supra,* reads as follows:

> "In criminal cases. Nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offense, or any offense punishable on summary conviction, compellable to give evidence for or against himself; or, except as hereinafter mentioned, shall render any person compellable to answer any question tending to criminate himself, or shall in any criminal proceeding render any husband competent or compellable to give evidence against his wife, or any wife competent or compellable to give evidence against her husband, except in such cases where such evidence may now be given and in such cases in which the accused is charged with the commission of an offense against the person of his wife or of her husband, as the case may be; provided also that in all criminal proceedings the husband or wife of the party accused shall be a competent witness for the defense."

It is here contended that where a husband is charged under Section 11676, Act 26, *Session Laws of Hawaii*

1949, of inducing, compelling and procuring his wife to practice prostitution, with intent in him thereby to obtain and secure from the wife a portion of the gains earned by her in such practice of prostitution, the offense is one that is against the person of the wife, and she is competent to testify against her husband where he is on trial for that offense.

In *Denning v. United States*, 247 Fed. 463, defendant was charged with having persuaded his wife to go from one state to another for the purpose of prostitution in violation of the Mann Act, 18 U. S. C. A., Section 2421 et seq. His conviction was based upon the testimony of his wife, and the question upon appeal was whether the wife was a competent witness. The United States Circuit Court of Appeals in holding that the wife was a competent witness in such a case said as follows:

> "It must be held that it is within the reason of the common-law exception to the rule of incompetency to permit the wife to testify against the husband when the commission of the offense charged against the latter is an act directed against the person of the former. It cannot be that the common-law would protect the wife against a single act of violence, and not against a system of assaults; against an act that brought merely mortification and shame, and not against a series of acts which brought degradation and destruction of body and soul; against a single essay at crime, and not against a continuing effort at pre-eminence in infamy.
>
> "The offense cannot be classed with those which merely offend the marital relation. It operates im-

mediately and directly upon the wife. It is an offense against the wife. A primary purpose of the Mann Act was to protect women who were weak from men who were bad. Its protection was not confined to unmarried women. Its punishment was not intended to be limited to unmarried men. Men led by cupidity to the base crime have utilized marriage in the accomplishment of their ends. They should not be permitted to use marriage to prevent their punishment. They should not be permitted to invoke a sacred institution, and the rules established for its protection, to secure immunity from punishment for the most infamous crime that could be devised for its degradation." (*Denning v. United States, supra,* at p. 465.)

In *Cohen v. United States,* 214 Fed. 23, defendant was charged for bringing his wife from one state to another with intent that she should practice prostitution. The Circuit Court of Appeals in holding that the wife was a competent witness in such a proceeding against her husband, stated as follows:

"At common law the husband and wife were each under total disability to testify for the other, but the disability did not extend to the testimony of one against the other. Such testimony of the one against the other was excluded, however, unless both the husband and wife waived the privilege and consented to its admission . . . But the common law made an exception to the rule of privilege in cases where the husband or wife was called as a witness to testify as to personal wrong or injury sustained from the other . . .

We are of the opinion that the personal injury to a wife which permits the admission of her testi-

mony against her husband, within the exception recognized at the common law, and expressed in the Oregon statute, is not confined to cases of personal violence, but may include cases involving a tort against the wife, or a serious moral wrong inflicted upon her, and that in a case of the prosecution of a man for bringing his wife from one "state to another with intent that she shall practice prostitution, in violation of the White Slave Act, his act in so doing is such a personal injury to her as to entitle her to testify against him." (*Cohen v. United States*, *supra*, at p. 29.)

The above cited case was taken to the United States Supreme Court on a writ of certiorari. The petition for writ of certiorari was denied by the United States Supreme Court in *Cohen v. United States*, 235 U. S. 696, 35 S. Ct. 199, 59 L. Ed. 430.

It has often been said that the common law is not immutable but flexible and by its own principles adapts itself to varying conditions. Courts in the face of changing conditions are not chained to ancient formulae but may enforce conditions deemed to have been wrought in the common law itself by force of changing conditions. *Funk v. U. S.*, 290 U. S. 371.

In *Dole v. Gear*, 14 Haw. 554, the Supreme Court of the Territory of Hawaii recognized that the common law consists of principles and not of set rules. In adopting the common law, we have adopted the fundamental principles and modes of reasoning, and the substance of its rules as illustrated by the reasons on which they are based rather than by the words in which they are expressed.

The modern growth and development of the common law rule regarding the testimony of one spouse against the other is primarily to be found in the decisions of the Federal courts. The Federal courts have uniformly ruled that under the common law as interpreted in the light of modern experience, reason, and in the furtherance of justice, the exception to the general rule making a wife incompetent to testify against her husband in criminal cases, except when she has suffered a personal injury through his action, permits the wife to testify against her husband in a prosecution for a crime instituted by the husband which corrupts the moral of the wife.

> *U. S. v. Rispoli,* 189 Fed. 271
> *U. S. v. Mitchell,* 137 F. (2d) 1006
> *Cohen v. U. S.,* 214 Fed. 23
> *U. S. v. Williams,* 55 F. Supp. 375
> *Denning v. U. S.,* 247 Fed. 463

The appellee respectfully submits that the act of the appellant as involved in this case was an offense against the person of his wife and that she was a competent witness against him in these proceedings.

B. THE EVIDENCE RELATING TO OTHER OFFENSES, THOSE COMMITTED PRIOR TO COVERTURE AND THOSE COMMITTED PRIOR TO THE STATUTE OF LIMITATIONS, WAS ADMISSIBLE, AND THE WITNESS, WHO WAS THE WIFE OF THE APPELLANT, WAS COMPETENT TO TESTIFY THERETO.

It is a well settled rule that evidence of facts showing motive, intent, plan and scheme on the part of the defendant (even though it tends to show former offenses of the defendant) may be given. "It is not error to admit evidence of facts showing motive, or

which are part of the transaction, or exhibit a train of circumstantial evidence of guilt, although such facts showed former offenses of the defendant."

> *Terr. v. Watanabe Masagi,* 16 Haw. 196
> *Terr. v. Chong Pang Yet,* 27 Haw. 693
> *Terr. v. Awana,* 28 Haw. 546
> *Terr. v. Oneha,* 29 Haw. 150
> *Terr. v. Abellana,* 38 Haw. 532
> *Wharton's Criminal Evidence,* 11th Ed., Vol. 1, Sec. 352, p. 527

In *Commonwealth v. Bell,* 288 Pa. 29, 135 Atl. 645, 647, the court said as follows:

> "While ordinarily evidence is not admissible of a crime distinct from that for which the defendant is being tried, the fact of such crime, and defendant's connection with it, may be proved whenever it tends to show guilty knowledge, design, plan, motive or intent, if these matters are in issue in the case on trial. ***the evidence referred to would have been admissible if the first four counts had never been drawn. Upon this point it is well said by the Superior Court (Commonwealth v. Bell, 88 Pa. Super. Ct. 216, 223):
> 'This evidence, documentary and oral, was admissible under the well-settled rule that evidence of similar and unconnected offenses may be offered to show guilty knowledge, design, plan, motive and intent when such is in issue, and this is true although the other offenses are beyond the statutory period: (Citing authorities.) Here are the evidence tended to show that the offenses charged were part of a system ***'."

The admission of evidence showing that beyond the

statute of limitations the defendant forced the complaining witness for the prosecution by threats and intimidation into the practice of prostitution and exacted from her the proceeds of such practice was not error. This showed his scheme and design and, with other testimony, also showed that it was a continuing offense up to the dates alleged in the indictment.

The case of *U. S. v. Williams, supra,* discusses thoroughly the rule that the wife of the defendant was a competent witness to testify that prior to the marriage the defendant forced her to go into the practice of prostitution.

The Supreme Court of the Territory of Hawaii, in the instant case, in ruling on the appellant's contention that the wife was not a competent witness to testify as to acts of the defendant prior to coverture, cited *U. S. v. Williams, supra,* and stated as follows:

> ". . . to permit the wife to testify against her husband as to injuries to her morals during coverture but not as to such injuries occurring before coverture, the court would arrive at a very anomalous position; if defendant were married to the woman at the time of the offense she could testify against him, "and if defendant and the woman were not married at the time of the offense and at the time of the trial she could testify against him, but if the woman were not married to him at the time of the offense but was at the time of the trial she could not testify against him. The cases holding to this anomalous rule go on the theory that some sort of forgiveness of the wrong may be assumed by the

marriage; if the injured person desires to forget the matter and to live in a happy marital state with the one who injured her, there is an aversion to requiring or permitting her to testify against her husband whom she has forgiven. This is readily understandable. The court further points out that when personal violence is used upon a woman she is the only one injured; society may be injured very rarely if at all, but such is not the case with injuries against the wife involving moral degradation.

The Mann Act, as has frequently been stated, was to protect 'weak women from bad men' and that the purpose of the Congress would be thwarted if the woman's lips were sealed against a vicious and degraded man just because he may have induced the 'weak woman' to marry him. 'It seems sound, therefore, to conclude that, under the common law interpreted in light of modern experience, reason, and in the furtherance of justice, a woman may testify against her husband when he has transported her in interstate commerce for the purposes of prostitution in violation of the Mann Act, and this rule of evidence should apply whether the transportation occurred during or prior to coverture.' (*United States v. Williams,* 55 F. Supp. 375, at page 380.)

Obviously, the purpose of our statute relating to procuring and pimping is, as is the Mann Act, to protect 'weak women from bad men.' The same reasoning applies to it as applies to the Mann Act and the purpose would better be served by permitting the woman to testify as to the acts forcing her into the practice of prostitution prior to marriage, particularly as the husband forced her continuance in such practice, and the subsequent marriage was apparently for the very purpose of attempting to

obtain protection for the vicious man." See *Terr. v. Alford*, 39 Haw. 460.

The appellee contends that the rule in the light of modern experience is as discussed by *U. S. v. Williams*, *supra*, and by the Supreme Court of the Territory of Hawaii in the instant case.

CONCLUSION

It is respectfully submitted that the errors assigned by the appellant are without merit and that the judgment appealed from should be affirmed.

Dated at Honolulu, T. H., this 18th day of February, A. D. 1953.

Respectfully submitted,

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RECEIPT of three copies of the foregoing Brief is acknowledged this .... day of February, A. D. 1953.

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